No. 77-187

In the Supreme Court of the United States

OCTOBER TERM, 1977

KALLIR, PHILIPS, ROSS, INCORPORATED, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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OPINIONS BELOW

The court of appeals rendered no opinion. The opinion of the district court on liability (Pet. App. A1-A28) is reported at 401 F. Supp. 66, and its opinion on relief (Pet. App. B1-B28) is reported at 420 F. Supp. 919.

JURISDICTION

The judgment of the court of appeals (see Appendix, *infra*, pp. 1a-2a) was entered on May 13, 1977. The petition for a writ of certiorari was filed on August 2, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court below properly held that petitioner violated Title VII of the Civil Rights Act of 1964 by discharging its employee for engaging in activities protected by Section 704(a) of the Act.

2. Whether the monetary relief awarded was proper.

STATUTES INVOLVED

Section 704(a) of Title VII of the Civil Rights Act of 1964, 78 Stat. 257, as amended, 42 U.S.C. (Supp. V) 2000e-3(a), in pertinent part, provides:

> It shall be an unlawful practice for an employer to discriminate against any of his employees * * * because he has opposed any practice made an unlawful employment practice by this title, or because he made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

Section 706(g) of Title VII, as amended, 78 Stat. 261, 42 U.S.C. (Supp. V) 2000e-5(g), in pertinent part, provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay * * * or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. * * *

STATEMENT

The Equal Employment Opportunity Commission filed this suit in the United States District Court for the Southern District of New York under Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. (Supp. V) 2000e-5(f)(1), alleging that petitioner had discharged respondent Josephine McGee in retaliation for engaging in conduct protected by Section 704(a) of the Act, 42 U.S.C. (Supp. V) 2000e-3(a). McGee intervened in the action (Pet. App. A3-A4).

Petitioner, an advertising agency, employed McGee from May 15, 1967 until May 15, 1973, when it discharged her (A. 16-20).[1] Starting as an administrative assistant at $8,000 a year, she received a number of promotions to positions of increasing responsibility, ending as a senior account executive earning $18,000 a year (*ibid.*). From 1969 until her discharge, she was assigned to the agency's second largest account, the Upjohn Company, a pharmaceutical firm (*ibid.*).

When McGee learned that a male senior account executive was being paid $25,000, she requested petitioner's president, John Kallir, to increase her salary to that amount (A. 23). Kallir advised her on December 4, 1972, that petitioner's executive committee would consider the matter in April, 1973 (A. 280). On December 15, 1972, McGee filed a complaint with the New York City Commission on Human Rights ("City Commission"), alleging sex discrimination in salary (A. 28).

When the City Commission's investigator requested an accurate job description of her duties as senior account

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[1] "A." refers to the joint appendix in the court of appeals. "Supp. A." refers to the supplemental appendix in that court.

executive, possibly from the client (A. 30, 52-53), McGee approached Phyllis Korzilius, a product manager at Upjohn, with whom she had been working closely for almost three and a half years (A. 155, 157, 158).[2] In explaining the purpose of the description, McGee told Korzilius that she had filed a sex discrimination complaint (A. 155), but she specifically requested that that fact be kept confidential (A. 156). Korzilius then provided McGee with a letter containing the necessary information (Pet. App. A6).

On March 13, 1973, the City Commission held an informal fact-finding conference to discuss McGee's complaint (A. 31), at which it produced the Korzilius letter to rebut petitioner's assertion that McGee did not perform all duties customarily performed by persons in the senior account-executive position (A. 32-33). Petitioner's representatives, including John Kallir, became so upset that the meeting had to be adjourned (A. 61, 76).

Within a week after the meeting, Kallir informed Upjohn that he had decided to suspend McGee from the agency (A. 110; Supp. A. 324). An Upjohn official assured Kallir that the agency's problem with McGee did not, in his view, make it "less effective" or "a less credible agency" and that he "didn't see how it, at least to that point, had affected us or even how it might" (Supp. A. 323). A few days later, Kallir notified McGee of her suspension (A. 13) and on May 15, 1973, McGee was discharged (Pet. App. A9-A10).[3] At the suggestion of the City

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[2]Based on her previous meeting with John Kallir, McGee did not believe that she would receive an objective evaluation from him (A. 30, 53).

[3]In response to a telephone call from the City Commission, John Kallir stated that McGee was suspended because she "had discussed the case with other people and that he would not tolerate that" (A. 63-64; see also A. 86-87).

Commission, McGee signed a complaint charging the agency with retaliatory conduct (A. 37).[4]

At trial petitioner alleged that McGee was discharged in part for interrupting her supervisor during a meeting with Upjohn officials in February, 1973, at which the agency made a preliminary presentation of plans for advertising a new product (A. 56, 72-73; Supp. A. 313). The district court, however, found that petitioner suspended and discharged McGee in retaliation for engaging in activity protected by Section 704(a) of the Act (Pet. App. A1-A28). It found that McGee's solicitation of the Korzilius letter was a "substantial cause" of, and the "real reason" for, her discharge (*id.* at A17, A27) and that petitioner had also discharged McGee because she had alledgedly discussed her charge with other female employees (*id.* at A12).[5] The court rejected petitioner's contention that McGee's discharge for involving a client in her discrimination claim was justified by business reasons (*id.* at A18), and found that petitioner's purported justification for discharging McGee because of her alleged behavior at the preliminary presentation was "sheer pretext advanced for the first time at the trial, more than two years after the event" (*id.* at A21-A22).

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[4]Despite the importance of a second, formal presentation to Upjohn made at the beginning of March, neither Kallir nor McGee's supervisor ever spoke to her about her conduct during the first presentation or about the conduct expected of her at the second presentation (Supp. A. 315). An executive vice-president of petitioner testified at trial that McGee's conduct at the first presentation, of which he had no personal knowledge, was the main reason for her discharge (A. 131). He stated in a pre-trial affidavit that McGee was discharged for soliciting letters of recommendation from Upjohn employees (A. 278-285).

[5]Kallir testified that one of the reasons underlying McGee's suspension was his concern that she would inform co-workers of her charge and advise them of their right to file a charge (Supp. A. 320-321, 322).

The parties were unable to agree on damages. The court awarded McGee back pay, reduced by interim earnings, and an additional year's salary to cover the period of time it was expected she would require to find employment at a salary commensurate with her skills (Pet. App. B23-B27). The court did not order reinstatement because the job from which McGee had been discharged required a relationship of trust and confidence with petitioner's executives which the court concluded could not exist because of the unusual bitterness of the litigation (*id.* at B25-B26).

The court of appeals affirmed on the basis of the district court's opinions.

ARGUMENT

1. Petitioner asserts (Pet. 12-14) that there is a conflict among the circuits over whether an employer's discharge of an employee violates Section 704(a) if the discharge resulted only partially and not solely from the employee's participation in activity protected by statute. This case does not present that issue, however, since the district court found that petitioner discharged McGee solely for conduct that the Act protects.[6] The court found that petitioner's assertion that it discharged McGee because of her conduct during the first presentation meeting in February, 1973, was "sheer pretext" and that the "real reason" for McGee's discharge was her solicitation of the job description from Korzilius and her conduct in allegedly informing co-workers of their statutory right to file a charge.

[6]The district court stated that "[e]ven if" defendant was in part motivated by McGee's conduct at the first presentation meeting, McGee's discharge was unlawful because it was also motivated by discriminatory reasons (Pet. App. A22, n. 17). Its finding, however, was that McGee's discharge was not motivated by that behavior. The court of appeals affirmed that finding, and in the absence of any exceptional showing of error, the concurrent findings of two lower courts is final. *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211, 214.

2. Petitioner contends (Pet. 14-16) that the courts below should have sustained McGee's discharge on the basis of petitioner's alleged good-faith belief that the discharge was required in light of the sensitive nature of the client-agency relationship in the advertising business. "Good faith," however, is not a relevant consideration in judging the propriety of an employer's actions taken in response to an employee's protected activities. As this Court stated in *National Labor Relations Board* v. *Burnup & Sims*, 379 U.S. 21, 23, "[a] protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith."

In any event, the evidence showed that petitioner had no reasonable basis for believing that McGee's solicitation of the Korzilius letter would impair its relationship with Upjohn. Petitioner suspended McGee immediately after it became aware of the Korzilius letter, without any attempt to ascertain the circumstances under which the letter was obtained or whether its solicitation was likely to have any adverse effect upon petitioner's relations with its client. After Kallir informed the Upjohn officials of his intention to suspend McGee, he had even less reason to believe that suspension was necessary; those officials assured him that the McGee charge would not have an effect on their business relationship.[7]

[7]Petitioner claims that in holding its actions unlawful, the courts below failed to strike the proper balance between an employee's right to engage in protected activity under Section 704(a) of Title VII and an employer's common law right to an employee's loyalty and conduct in the employer's best interest (Pet. 17-18). As the district court stated, "[p]laintiff's statutory right to engage in the protected activity of assisting and participating in the investigation of her charge against defendant would be without substance if de-

3. The district court refused to reinstate McGee because the unusual hostility engendered by the litigation had destroyed the confidential relationship with petitioner's executives that is required for a senior account executive. Instead, the court awarded her one year's additional salary to give her a fair opportunity, in view of existing labor market conditions, to seek and secure employment. This relief was within the district court's broad equitable powers.

In order to provide complete relief, an award of back pay ordinarily should continue until the discrimination is remedied,[8] which in this case would be until McGee secured employment at a comparable salary. Although the relief in this case does not provide for the contingency that McGee would find employment before the year had ended (Pet. 20), it also does not allow for the possibility that she might not be able to do so within that period. The additional salary for one year constitutes a reasonable reconciliation of these factors, terminates the litigation, and avoids the necessity of repeatedly reopening the case to change the amount of damages. Cf. *United States* v. *Georgia Power Co.*, 474 F. 2d 906 (C.A. 5). Other courts have required or approved similar salary payments where hostility generated by litigation makes reinstatement impractical. See, *e.g.*, *Burton* v. *Cascade School District*, 512 F. 2d 850, 852-854 (C.A. 9);

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fendant could justify her discharge based upon her discreet solicitation of a letter setting forth the nature of her work because of its excessive squeamishness about relations with a client" (Pet. App. A18-A19). Nothing in the record suggests that a different balance should have been reached.

[8] *Patterson* v. *American Tobacco Co.*, 535 F. 2d 257, 268-269 (C.A. 4), certiorari denied, 429 U.S. 920; *Equal Employment Opportunity Commission* v. *Enterprise Association Steamfitters Local 638*, 542 F. 2d 579, 590-591 (C.A. 2).

National Labor Relations Board v. *King Louie Bowling Corp. of Missouri*, 472 F. 2d 1192, 1193 (C.A. 8); *Hyland* v. *Kenner Products Co.*, 13 FEP Cases 1309, 1321-1322 (S.D. Ohio).

An award of additional salary would be made only in those peculiar factual circumstances where it would be the only feasible means by which a victim of discrimination can secure complete relief. The propriety of this relief does not present a significant issue warranting review by this Court.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

ABNER W. SIBAL,
General Counsel,

JOSEPH T. EDDINS,
Associate General Counsel,

BEATRICE ROSENBERG,
Assistant General Counsel,

GERALD T. LETWIN,
Attorney,
Equal Employment Opportunity Commission.

OCTOBER 1977.

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[9] Petitioner also asserts (Pet. 20-21) that the courts below erred in awarding back pay for the eight months between the hearings on damages before the master and entry of the court's judgment, without affording petitioner the opportunity to determine whether McGee remained unemployed during that period. But petitioner never sought such an opportunity before the district court. Since petitioner was in large part responsible for the eight-month delay (Pet. App. B3-B8), it should not be heard to raise the issue at this late date.

APPENDIX

UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 13th day of May one thousand nine hundred and seventy-seven.

Present:

HON. J. JOSEPH SMITH,
HON. WILLIAM H. MULLIGAN,
CIRCUIT JUDGES

HON. M. JOSEPH BLUMENFELD,
DISTRICT JUDGE*

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

PLAINTIFF-APPELLEE-APPELLANT,

-AND-

JOSEPHINE MCGEE,
PLAINTIFF-INTERVENOR-APPELLEE-APPELLANT,

-AGAINST-

KALLIR, PHILIPS, ROSS, INC.,

DEFENDANT-APPELLANT-APPELLEE.

76-6191

Appeal from the United States District Court for the Southern District of New York.

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*M. Joseph Blumenfeld, District of Connecticut, sitting by designation.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed on the opinions below, reported at 401 F. Supp. 66; 420 F. Supp. 919.

/s/ J. Joseph Smith

J. Joseph Smith

/s/ William H.Mulligan

William H. Mulligan

/s/ M. Joseph Blumenfeld

M. Joseph Blumenfeld